

APPENDIX IX

CLEAN AIR ACT CIVIL PENALTY POLICY APPLICABLE TO PERSONS WHO PERFORM SERVICE FOR CONSIDERATION ON A MOTOR VEHICLE AIR CONDITIONER INVOLVING THE REFRIGERANT OR WHO SELL SMALL CONTAINERS OF REFRIGERANT IN VIOLATION OF 40 C.F.R. PART 82, PROTECTION OF THE STRATOSPHERIC OZONE, SUBPART B: SERVICING OF MOTOR VEHICLE AIR CONDITIONERS July 19, 1993

Introduction

This appendix provides guidance for calculating the civil penalties EPA will require in pre-trial settlement of judicial enforcement actions, as well as the pleading and settlement of administrative enforcement actions, pursuant to Sections 113(b) and (d) and Section 609 of the Clean Air Act ("CAA"), as amended, and 40 C.F.R. Part 82, Subpart B against persons who perform service for consideration on motor vehicle air conditioners involving the refrigerant or who sell small containers of refrigerant. Settlement of violations of the recordkeeping and reporting provisions of the regulations should not, for purposes of penalty assessment, be treated differently from any other CAA recordkeeping and reporting violation. See Clean Air Act Stationary Source Civil Penalty Policy, p. 12.

This appendix is to be used for settlement purposes in civil judicial cases, but EPA retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the appendix is to be used in conjunction with the Stationary Source Civil Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases.

To assist EPA in monitoring compliance, the regulations require persons who perform service for consideration on motor vehicle air conditioners involving the refrigerant to report one time and to keep records; persons who certify technicians must report once every two years; and persons who sell small cans of refrigerant must keep records and post a sign.

The Penalties for Violating Regulations

Section 113 of the Clean Air Act allows EPA to seek penalties of up to \$25,000 per day per violation. Each time a motor vehicle air conditioner is serviced without properly using approved refrigerant recycling or recovery equipment or is serviced by an uncertified technician, each container of

- 2 -

refrigerant containing less than 20 pounds is sold to a

person who is not a certified technician or who does not certify to the retail establishment that the container was purchased for resale, and each time a technician is certified by a technician training program which has not been approved by the EPA Administrator constitutes a separate violation (each with a statutory maximum of \$25,000).

EPA may in appropriate cases accept less than the statutory maximum in settlement. The penalty assessments contained in this policy (this appendix read with the Stationary Source Civil Penalty Policy) reflect reductions from the statutory maximum which can be made based on the statutory penalty assessment criteria found in Section 113(e) of the Act. This policy takes into account the size of the violator's business, the violator's full compliance history, the economic benefit of noncompliance, and the seriousness of the violation. The other factors in Section 113(e) such as the economic impact of the penalty on the business and any good faith efforts to comply should be taken into account in determining whether the penalty should be reduced, but the burden is on the defendant to raise those factors.

Penalties for violations are based on the particular regulatory requirements violated. The minimum settlement penalty amount is the sum of the penalties assigned to each violation of a requirement.

Calculating a Penalty

In accordance with the general practice EPA follows when calculating all Clean Air Act civil penalties, penalties assessed for performing any service for consideration on a motor vehicle air conditioner involving the refrigerant or selling small containers of refrigerant will be the sum of an economic benefit component and a gravity component.

Economic Benefit

This component is a measure of the economic benefit accruing to the facility as a result of noncompliance with the Act. To determine the actual economic benefit to a person¹ who performs

¹ "Person" includes the technician who actually works on the motor vehicle air conditioner and the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician. For the purpose of calculating the penalty under this policy, it

service for consideration on motor vehicle air conditioners involving the refrigerant, EPA will rely on the matrix which follows to determine the economic benefit from delayed costs (failure to purchase approved recycling or recovery equipment) and avoided costs (failure to properly operate and maintain such equipment).

Economic Benefit From Servicing Motor Vehicle Air Conditioners Without Properly Using Approved Refrigerant Recovery Equipment:

Number of Months since August 13, 1992/Economic Benefit					
# of Months	Economic Benefit	# of Months	Economic Benefit	# of Months	Economic Benefit
1-3	\$115	22-24	\$1103	43-45	\$2494
4-6	\$236	25-27	\$1274	46-48	\$2733
7-9	\$363	28-30	\$1454	49-51	\$2984
10-12	\$496	31-33	\$1642	52-54	\$3247
13-15	\$637	34-36	\$1840	55-57	\$3523
16-18	\$785	37-39	\$2048	58-60	\$3811
19-21	\$940	40-42	\$2266		

The matrix reflects that the service facility should have purchased one piece of recovery equipment. The matrix was calculated using August 13, 1992 as the date noncompliance began. The date of compliance (the date equipment is acquired) and the date that the penalty is paid are the same. Because the matrix reflects that enforcement actions will be taken against the service facility and because many technicians will be personally responsible for the cost of getting trained and certified, the matrix does not include the cost of technician certification. In addition, it is difficult to predict how many uncertified technicians a service facility might employ to perform service for consideration on motor vehicle air conditioners involving the refrigerant. If the Regions find that service facilities usually pay for technician training, then they should include the cost of technician training and certification in their economic benefit

was assumed that Regions would generally take enforcement actions against service facilities rather than individual technicians. Both technicians and service facilities, however, are legally responsible for complying with 40 C.F.R. Part 82, Subpart B.

calculations. In any enforcement action against an individual uncertified technician, the Regions should include the cost of training and certification in the economic benefit calculation. The matrix is based on the BEN computer model. If the litigation team determines that the matrix does not reflect the defendant's actual economic benefit in a particular enforcement action, the litigation team may calculate the benefit using the BEN model with inputs specific to the action.

The economic benefit to the person² who sells cans of refrigerant containing less than 20 pounds is the profit on each can. The profit will vary depending on how much the person paid to purchase the cans and at what price the cans are sold. The amount of profit averages \$1.50 per 12 ounce can.

EPA policy requires the removal of the violator's economic benefit in every enforcement action, unless the factors in Section 113(e) or litigation risks suggest that a reduction is appropriate. Although the Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than \$5,000 (see p. 7), Regions should assess the economic benefit component in Section 609 enforcement actions. Given that the economic benefit component in Section 609 enforcement actions will likely always be small (less than \$5,000), if the general rule from the Stationary Source Civil Penalty Policy were to apply, the economic benefit component would rarely be included in the penalty calculation. Therefore, Regions should assess an economic benefit component in all Section 609 cases.

Gravity

In addition to economic benefit, the violator must pay the gravity component of the penalty. The gravity component is the measure of the seriousness of the violation. The seriousness of the violation has two components: the importance to the

² "Person" includes the employee who actually sells the small can and the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the employee. For the purpose of calculating the penalty under this policy, it was assumed that Regions would generally take enforcement actions against retail facilities rather than individual employees. Both employees and retail facilities, however, are legally responsible for complying with 40 C.F.R. Part 82, Subpart B.

regulatory scheme and the potential environmental harm (ozone-depleting effect of the violator's actions) resulting from the violations.

The following violations can defeat the purpose of Section 609 by permitting the release of substances that degrade the stratospheric ozone layer. Their importance to the regulatory scheme, therefore, includes the assessment of the following

penalties:

A penalty of \$10,000 against any person who performs services for consideration on motor vehicle air conditioners involving the refrigerant without properly using approved refrigerant recycling or recovery equipment;

A penalty of \$15,000 against each person who performs services for consideration on motor vehicle air conditioners involving the refrigerant without properly using approved refrigerant recycling or recovery equipment and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

A penalty of \$5,000 against any person who performs services for consideration on motor vehicle air conditioners involving the refrigerant for each person who performs such service who is not properly trained and certified by a technician certification program approved by the EPA Administrator;

A penalty of \$2,000 against any person who sells a container of refrigerant (suitable for use in a motor vehicle air conditioner) containing less than 20 pounds to a person who is not a certified technician or who does not certify to the seller that the container was purchased for resale;

A penalty of \$5,000 against any person who sells a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the seller that the container was purchased for resale and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

A penalty of \$5,000 for each certificate issued after the effective date of the regulation against any technician training program that has not received approval from the Administrator of

EPA;

A penalty of \$1,000 against any retail establishment that sells or offers for sale the refrigerant suitable for use in a motor vehicle air conditioner in containers of less than 20 pounds and fails to post a sign that meets the requirements of 40 C.F.R. §82.42(c). This amount should be assessed regardless of how many (if any) small cans are actually sold after November 15, 1992, as long as they are offered for sale. This amount is in addition to the \$2,000 assessment described above against the retail establishment for the sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale;

A penalty of \$2,500 against any retail establishment that sells or offers for sale the refrigerant suitable for use in a motor vehicle air conditioner in containers of less than 20 pounds and fails to post a sign that meets the requirements of 40 C.F.R. §82.42(c) and who has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order);

EPA acknowledges that multiple violations of the Section 609 requirements may significantly increase the potential environmental harm (ozone-depleting effect of the violator's actions) resulting from the violations. The Agency, therefore, will assess the following additional amounts for each separate violation to ensure that the total penalty assessed appropriately reflects the seriousness of the defendant's violations:

EPA will assess \$40³ against any person for each motor vehicle air conditioner serviced without properly using approved refrigerant recycling or recovery equipment, or \$50 against any person who have previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order) for each motor vehicle air conditioner serviced without properly using approved refrigerant recycling equipment; and

³ EPA estimates that the benefit to be obtained from avoiding the release of 1 kilogram of ozone depleting substance ranges from \$13-\$53/kg. For the purposes of this penalty policy, the benefit should be calculated at \$40/kg. See Regulatory Impact Analysis for Section 608, Chapter 5 (March 25, 1993).

EPA will assess \$18⁴ per pound against any person for each sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale and \$25 against any person that has previously been the subject of a Section 609 enforcement response (e.g. notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative or judicial order) for each sale of a container of refrigerant containing less than 20 pounds to a person who is not a certified technician or who does not certify to the retail establishment that it is purchased for resale.

EPA will assess reporting violations pursuant to the Clean Air Act Stationary Source Civil Penalty Policy, October 25, 1991, page 12. However, this assessment shall not include a length of time violation component.

EPA will assess an additional amount to scale the penalty to the size of the violator using the following matrix:

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

Under \$100,000	\$0
\$100,001 - \$500,000	\$1,000
\$500,001 - \$1,000,000	\$2,500
1,000,001 - 5,000,000	\$5,000
5,000,001 - 20,000,000	\$10,000
20,000,001 - 40,000,000	\$15,000
40,000,001 and above	\$20,000

Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

Adjustments to the gravity component must be made in accordance with the provisions of the Stationary Source Civil Penalty Policy, pp. 15-19.

Mitigating Penalty Amounts

Application of this policy significantly compromises the penalty amount EPA is authorized to pursue under the CAA. Penalty amounts calculated in accordance with this policy

⁴ See fn. 3.

represent the minimum penalty that EPA can accept in settlement of cases of this nature. Reductions from this amount are acceptable only on the basis of the violator's demonstrated inability to pay the full amount (substantiated in accordance with Agency policy) or other unique factors. In civil judicial actions, a proposed penalty reduction from the amount calculated under this policy must be approved by the Enforcement Counsel for the Air Enforcement Division. If the litigation team believes that reduction of the penalty is appropriate, the case file should contain both a memorandum justifying the reduction and documentation that the penalty reduction was approved. In administrative enforcement actions, Regional Administrators or their designees must submit penalty justification documentation within 20 days of issuance or signing of consent agreements to the Director of the Stationary Source Compliance Division in the Office of Air Quality Planning and Standards and the Enforcement Counsel for Air in the Office of Enforcement.

Examples of Penalty Calculations

Following are examples of the application of this policy. Adjustments to the gravity component are made in accordance with the Stationary Source Civil Penalty Policy.

Example 1

Ace Automotive Air-Conditioning Service, Incorporated (ACE) services motor vehicle air conditioners. Despite a significant outreach effort by the Region (acquainting the regulated community with Section 609's requirements), Ace did not submit the required owner certification to EPA and failed to purchase recovery or recycling equipment. A search of Ace's records indicates that Ace has serviced 60 motor vehicle air conditioners since the effective date of the rule. The facility performed 150 service jobs in 1990 and 1991. None of the three technicians who regularly service motor vehicle air conditioners are trained and certified. EPA inspected the facility on March 13, 1993.

Economic Benefit Component

The economic benefit of delaying the purchase of equipment for seven months + avoided costs of operating equipment	\$363
--	-------

Gravity Component

Importance to regulatory scheme (servicing without equipment)	\$10,000
---	----------

60 motor vehicle air conditioners (at \$40 per vehicle)	2,400
--	-------

Reporting violation (failure to certify to EPA that person performing service is using approved recycling equipment and that such person is properly trained and certified) (from Stationary Source Civil Penalty Policy, page 12)	15,000
--	--------

3 Uncertified technicians performing service (at \$5,000 per technician)	15,000
---	--------

Size of violator (Net Worth is approx. \$2,000,000)	<u>+5,000</u>
--	---------------

Total Gravity	\$47,400
---------------	----------

Preliminary deterrence amount

Economic Benefit Component	\$363
----------------------------	-------

Gravity Component	<u>+47,763</u>
-------------------	----------------

Adjustment factors

20% upward adjustment to the gravity component - Ace should have been aware of Section 609's requirements	+ 9,552.60
---	------------

<u>Minimum penalty settlement amount</u>	\$57,315.60 =====
--	----------------------

Example 2

Diamond Auto Parts sells CFCs in canisters containing 14 ounces. On May 16, 1993, an EPA inspector purchased two 14 ounce cans of refrigerant. He was not asked to show his technician training certificate which he claimed to have. In addition, the inspector noted there was no sign in the check out area notifying customers that the sale of such cans is prohibited unless the purchaser is a trained technician. The inspector asked the owner whether the sign was posted on or after November 15, 1992. The owner responded that he never posted the sign.

Economic Benefit Component

2 cans of refrigerant (at \$1.50 per 12 ounce can)	\$3.50
---	--------

Gravity Component

Importance to regulatory scheme (Sale of small can of refrigerant)	\$2,000
2 - 14 ounce cans of refrigerant (at \$18 per pound)	31.50
Importance to regulatory scheme (Failing to post sign)	1,000
Size of violator (Net Worth is approx. \$6,000,000)	<u>+3,031.50</u>
Total Gravity	\$ 6,063.00

Preliminary deterrence amount

Economic Benefit Component	\$3.50
Gravity Component	+6,063.00

Minimum Settlement Penalty Amount

\$6,066.50
=====

Summary

Type of violation	Penalty amount
Servicing without equipment	1st violation - \$10,000
	2nd violation - \$15,000
	\$40/per motor vehicle
Failing to certify	\$15,000
Uncertified technicians	\$5,000/per technician
Sale of Small Cans to Non-Technician	1st violation - \$2,000
	2nd violation - \$5,000
	\$18/per pound
Uncertified Training Program	\$5,000/certificate
Failure to Post Sign	1st violation - 1,000
	2nd violation - 2,500